

DEPARTMENT OF STATE REVENUE

04-20171296.LOF

10-20171297.LOF

03-20171298.LOF

Letter of Findings: 04-20171296; 10-20171297; 03-20171298
Gross Retail, Withholding, Food and Beverage Tax
For the Years 2014, 2015, and 2016

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Combination Gas Station / Convenience store, was unable to meet its burden of establishing that the Department's proposed assessment of additional sales, withholding, and food and beverage tax was wrong; Gas Station / Convenience Store failed to maintain complete, contemporaneous, and accurate records of fuel and convenience store item sales, and the Gas Station / Convenience Store's unsubstantiated reconstruction of its business records - although not frivolous - did not overcome the deference properly granted the Department's original assessment.

ISSUE

I. Sales, Withholding, and Food and Beverage Taxes - Best Information Available Assessments.

Authority: IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-9-21-1 et seq.; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, (Ind. Tax Ct. 2007); [45 IAC 15-5-1](#).

Taxpayer argues that the Department of Revenue overstated the amount of sales transactions which occurred at its business location resulting in the assessment of unwarranted additional sales, withholding, and food and beverage taxes.

STATEMENT OF FACTS

Taxpayer is an Indiana S Corporation which operates an Indiana combination gas station / convenience store. Taxpayer sells soda, candy, chips, cigarettes, prepaid phone cards, lottery tickets, and the like.

The Indiana Department of Revenue ("Department") conducted a gross retail (sales), use, withholding, and food and beverage tax audit of the business location. That audit resulted in an assessment of additional tax based on the audit's determination that Taxpayer had additional retail sales, additional food sales, and failed to report the correct amount of withholding tax.

As a result, the Department issued Taxpayer an assessment of additional sales, withholding, and food and beverage tax. Taxpayer disagreed with the assessment of additional taxes and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings addresses the assessment of sales, withholding, and food and beverage taxes.

I. Sales, Withholding, and Food and Beverage Taxes - Best Information Available Assessments.

DISCUSSION

The issue is whether Taxpayer established that the assessments of Indiana sales, withholding, and food and beverages taxes were entirely unwarranted on the ground that the Department's audit overstated the amount of taxes owed.

A. Audit Results.

1. Records Request.

According to the Department's audit report, Taxpayer was "contacted multiple times to obtain records." The Department's efforts to contact Taxpayer began February 2017 and concluded August 2017. As explained in the audit report:

- An "initial letter" was sent to Taxpayer's business address February 2017. Taxpayer did not respond to this first letter;
- A "certified letter" was sent to Taxpayer's business address March 2017. Although the signature card - indicating that the letter was received - was returned to the Department, Taxpayer did not respond to this letter;
- A letter requesting business documents was sent to the Taxpayer's business address April 2017. That letter requested that Taxpayer contact the Department's audit representative;
- The Department's audit representative "hand delivered a sealed records request" to Taxpayer's business location June 2017;
- Taxpayer called the Department's representative stating that "he had not received prior notifications from the auditor." As detailed in the subsequent audit report:
 - The auditor explained the audit and what records would be required to complete the audit. Auditor obtained a contact number and email address from the [T]axpayer. Auditor emailed a list of required records and a projected best information available adjustment for sales and use tax if records are not provided. A deadline of June 14, 2014 was given to provide records for audit.
- On June 12, 2017, Taxpayer emailed the Department's representative requesting an additional 60 days to provide the requested records. The Department's representative granted the request extending the deadline to provide the requested records to August 2017.
- On August 1, the Department's audit representative emailed Taxpayer reminding him of the deadline to provide the necessary records.
- On August 3, Taxpayer asked for a 30 day extension to provide the records. Four days later the Department's audit representative denied the request and proceeded to issue assessments based on the "best information available."

During the course of the administrative protest, Taxpayer's representatives explained that the originally requested records were unavailable because they had been destroyed.

2. Sales Taxes.

The Department's audit assessed additional sales tax based on the "best information" available to the Department because, over a seven month period, Taxpayer failed to provide the requested business records and tax returns. As authority for doing so, the Department's audit report cited to IC § 6-8.1-5-1(b) which provides:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. IC § 6-8.1-5-1(b). See also [45 IAC 15-5-1](#).

In calculating Taxpayer's fuel sales, the audit "multiplied the monthly gallons of gasoline purchased by the [Taxpayer] per ST-103 Distributor Reports, by the average per gallon price of gasoline." In comparing fuel sales to total "inside" convenience store sales, the audit found that "inside sales on the ST-103MP are significantly lower given this comparison." Thereafter, based on these projected fuel sales and NACS (National Association of Convenience Stores) industry standards, the audit was able to calculate total store sales for Taxpayer.

Because Taxpayer did not provide records of its exempt customer sales, the audit allowed a five percent adjustment to account for those sales (exempt food, lottery tickets, and the like). The Department also "credited back the total taxable sales reported by the [T]axpayer."

3. Withholding Tax.

The Department's audit reviewed Taxpayer's withholding returns on file with the Department noting that Taxpayer failed to file 2013 and 2014 WH-3 (Annual Withholding Reconciliation Form) returns. The Department estimated - based on what it regarded as the "best information available" - that Taxpayer had not paid sufficient withholding tax. As explained in the audit report:

Auditor determined there was insufficient withholding tax paid to operate a convenience store that is open 18 hours per day Monday through Friday and 17 hours per day Saturday and Sunday. During the site visit the auditor observed at least two employees working onsite.

Faced with Taxpayer's failure to produce the requested records, the audit compared Taxpayer's fuel sales with "a reasonable estimate of wages" found in BizStats.com. The audit report notes that this BizStat resource does not provide "statistics for convenience stores" but does provide statistics for "gasoline stations and for food and beverage retail stores."

Distinguishing the statistics for gas stations and food stores, "each business segment was calculated separately" as follows:

Wages for the convenience store portion of the business were determined by multiplying the total amount of merchandise/inside sales by 9.44[percent].

[W]ages for the fuel side of the business [were] calculated by multiplying fuel sales by 2.75[percent].

The audit credited Taxpayer for the amount of withholding tax it had paid and also calculated the amount of local (Delaware county) tax due.

4. Food and Beverage Tax.

The Department noted that Taxpayer conducted food sales subject to the food and beverage tax, was located in Delaware County, and was subject to that county's one percent food and beverage tax. IC § 6-9-21-1 et seq.

Because Taxpayer failed to provide the requested business records and tax returns, the audit resorted to making an adjustment based on the "best information available." IC § 6-8.1-5-1(b). In the case of the food and beverage tax, the audit began with the calculated amount of fuel sales and the calculated amount of convenience store sales. With those amounts in mind, the audit cited to NACS (National Association of Convenience Stores) industry standards to determine the amount of additional food and beverage tax consistent with the revised amount of in-store, convenience sales.

National Association of Convenience stores reports that food service items accounted for 21.7[percent] of all in-store sales in 2016; 20.8[percent] in 2015; and 19[percent] in 2014. Auditor multiplied total merchandise/in-store sales by this amount to calculate total food services sales. The auditor credited back the total food services sales on the FAB Tax Return. The remaining taxable food service sales were multiplied by 1[percent] to calculate the FAB tax adjustment.

B. Taxpayer's Response.

Taxpayer's representatives object to the assessment of flow-through income on the ground that the audit's assessments of additional tax was excessive because the Department's audit overstated the amount of sales attributable to Taxpayer's convenience store.

Although Taxpayer failed to provide the Department's audit with underlying sales and business transactions, Taxpayer's representatives have reconstructed what the representatives believe is a more accurate method of determining the convenience store's sales activities. Taxpayer's representatives explain that they are unable to produce the records originally requested February through August 2017 because those records were destroyed but that their substitute calculation is more accurate than the Department's own assessment.

Taxpayer's representatives explain that they reviewed the S Corporation's bank account deposit records for 2015 through 2016. After reviewing the deposit records, Taxpayer deducted - as unrelated income - transfer deposits received from Taxpayer's unrelated business interests. Taxpayer also deducted "refunds and rebates" attributable

to the S Corporation's fuel supplier. Taxpayer then deducted the amount of sales and food and beverage tax amounts paid on behalf of the S Corporation. Taxpayer's representatives conclude that Taxpayer had no unreported income and that the Department's pending assessment of additional income tax is entirely unwarranted.

C. Hearing Analysis.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

As an individual conducting retail transactions and collecting sales and other taxes on behalf of the state, Taxpayer was required to maintain complete, contemporaneous, and accurate financial records including cash register receipts. "Every person subject to a listed tax must keep books and records so that the [D]epartment can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). The "records" referenced "include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks." *Id.*

In the absence of accurate or complete records, Indiana law requires that the Department issue a proposed assessment based on the best information the Department can obtain. "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." IC § 6-8.1-5-1(b). See also [45 IAC 15-5-1](#).

The Department is unable to agree that Taxpayer has made a quantifiably specific objection to the results of the audit sufficient to overcome the presumption of correctness granted the original audit assessment. *Caterpillar, Inc.*, 15 N.E.3d at 583 (Ind. 2014). Taxpayer's calculation leaves a number of unanswered questions; is the bank account the sole account managed by Taxpayer? Does Taxpayer's calculation account for any cash only transactions between the S Corporation and its vendors? Does Taxpayer's calculation accurately account for the distinction between exempt and taxable customer transactions?

While Taxpayer's alternative calculation is not frivolous, it is no substitute for the contemporaneous, detailed records required under Indiana law.

The Department does not disagree with Taxpayer's suggestion that there *may* be an alternative method of determining the convenience store income, but Taxpayer has not met its burden of establishing that the assessment was "wrong" as required by IC § 6-8.1-5-1(c). Taxpayer has not established that the Department should not defer to the original audit findings.

FINDING

Taxpayer's protest is respectfully denied.

April 9, 2018

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An [html](#) version of this document.